



# MONTHLY CASE-LAW DIGEST

## January 2021

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## I. INSTITUTIONAL PROVISIONS

### Judgment of the General Court (Third Chamber, Extended Composition) of 27 January 2021

[Case T-699/17](#)

[Poland v Commission](#)

Environment – Directive 2010/75/EU – Industrial emissions – Implementing Decision (EU) 2017/1442 – Large combustion plants – Best available techniques (BAT) conclusions – Article 16(4) and (5) TEU – Article 3(2) and (3) of Protocol (No 36) on transitional provisions – Application of the law *ratione temporis* – Comitology

On 9 March 2017, the Commission submitted to the committee established by the Directive on industrial emissions<sup>1</sup> ('the committee') a draft implementing decision setting out best available techniques ('BAT') conclusions for large combustion plants. In accordance with that directive,<sup>2</sup> its BAT conclusions serve as the reference for setting the permit conditions for the operation of large combustion plants granted by the authorities of the Member States.

In that regard, the Directive on industrial emissions provides that BAT conclusions are adopted in two stages.<sup>3</sup> The first stage consists in drawing up a technical BAT reference document. In the second stage, the Commission submits a draft implementing decision on BAT conclusions to the committee, which is composed of representatives of the Member States. Where that committee delivers a positive opinion, the Commission adopts an implementing decision setting out the BAT conclusions.

As regards, more specifically, the adoption of the draft submitted by the Commission at issue in the present case, the Regulation on comitology<sup>4</sup> required, moreover, that the opinion of the committee be delivered by the qualified majority defined in Article 16(4) and (5) TEU.

In that context, the Republic of Poland requested, on 30 March 2017, that the committee adopt its opinion in accordance with the qualified-majority voting rules laid down in Article 3(3) of Protocol (No 36) on transitional provisions<sup>5</sup> ('Protocol No 36'), which correspond to those applicable prior to the entry into force of the Treaty of Lisbon, in accordance with Article 3(2) of that protocol. That latter provision provides that, between 1 November 2014 and 31 March 2017, when an act is to be adopted by qualified majority, a member of the Council may request that it be adopted in accordance with the qualified majority provided for in Article 3(3) of Protocol No 36.

That Polish application was, however, rejected and the committee issued a favourable opinion by qualified majority in accordance with the new rules laid down in Article 16(4) TEU. Following that opinion, the Commission adopted the implementing decision establishing BAT conclusions for large combustion plants.<sup>6</sup>

The Republic of Poland brought an action for annulment against that implementing decision, alleging, *inter alia*, infringement of the provisions applicable in relation to the qualified majority.

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<sup>1</sup> Article 75 of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17) ('the Directive on industrial emissions').

<sup>2</sup> Article 14(3) of the Directive on industrial emissions.

<sup>3</sup> Article 13 of the Directive on industrial emissions and Annex to Commission Implementing Decision 2012/119/EU of 10 February 2012 laying down rules concerning guidance on the collection of data and on the drawing up of BAT reference documents and on their quality assurance referred to in Directive 2010/75 (OJ 2012 L 63, p. 1).

<sup>4</sup> Article 5 of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13).

<sup>5</sup> Protocol (No 36) on transitional provisions (OJ 2016 C 202, p. 321).

<sup>6</sup> Commission Implementing Decision (EU) 2017/1442 of 31 July 2017 establishing best available techniques (BAT) conclusions, under Directive 2010/75/EU of the European Parliament and of the Council, for large combustion plants (OJ 2017 L 212, p. 1).



That action is upheld by the Third Chamber, Extended Composition, of the Court. In its judgment, the Court examines the novel question of whether, in order to benefit from the rules on qualified-majority voting provided for in Article 3(3) of Protocol No 36, corresponding to those applicable prior to the entry into force of the Treaty of Lisbon, it suffices for a Member State to make a request to that effect between 1 November 2014 and 31 March 2017, or whether it is necessary that the decision should also be taken during that period.

#### Findings of the Court

Basing itself on a literal, systematic, historical and teleological interpretation of Article 3(2) of Protocol No 36, the Court holds that, in order for a draft act to be adopted in accordance with the qualified-majority rules laid down in Article 3(3) of Protocol No 36, it suffices that the application of those rules is requested by a Member State between 1 November 2014 and 31 March 2017, without it being necessary that the vote on the draft act in question must also take place between those dates.

The right conferred on the Member States to request, during the period from 1 November 2014 to 31 March 2017, qualified-majority voting in accordance with the rules laid down in Article 3(3) of Protocol No 36 necessarily implies that, following the submission of such a request by a Member State, the vote is to be taken in accordance with those same rules, even when that vote takes place after 31 March 2017. According to the Court, such an interpretation alone is capable of ensuring that a Member State is able effectively to exercise that right during the entirety of that period, up to the last day of the prescribed period.

In that regard, the Court further states that Article 3(2) of Protocol No 36 is a transitional provision governing one of the three transitional stages in relation to the application of the rules on qualified-majority voting following the entry into force of the Treaty of Lisbon, and not an exception to the rule laid down in Article 16(4) TEU.

That interpretation is also supported by the principle of legal certainty, which requires, *inter alia*, that legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those persons must be able to ascertain unequivocally their rights and obligations and to take steps accordingly.

Since a failure to comply with voting arrangements constitutes an infringement of an essential procedural requirement within the meaning of Article 263 TFEU, the Court upholds the action for annulment of the implementing decision establishing BAT conclusions for large combustion plants.

However, since the annulment of that implementing decision with immediate effect would be liable to jeopardise uniform permit conditions for large combustion plants in the European Union, would risk leading to legal uncertainty for the parties concerned and would run counter to the objectives of ensuring a high level of environmental protection and the improvement of environmental quality, the Court maintains the effects of that decision until the entry into force, within a reasonable period, of a new act intended to replace it and adopted in accordance with the qualified-majority rules laid down in Article 3(3) of Protocol No 36.

## II. Legal Acts

### Judgment of the Court (Fifth Chamber) of 21 January 2021

[Case C-761/18 P](#)

[Leino-Sandberg v Parliament](#)

Appeal – Access to documents of the EU institutions – Regulation (EC) No 1049/2001 – Article 10 – Refusal to grant access – Action before the General Court of the European Union against a decision by the European Parliament refusing to grant access to a document – Disclosure of the annotated document by a third party after the action was lodged – Order that there was no need to adjudicate pronounced by the General Court on the ground that was no longer any interest in bringing proceedings – Error of law

The appellant, a University Professor, submitted to the European Parliament, in the context of two research projects relating to transparency in trilogues, a request for access to documents of that institution refusing to grant to a person access to certain documents containing information obtained in the context of trilogues.<sup>7</sup> By its decision of 3 April 2017,<sup>8</sup> the Parliament refused to grant the appellant access to the requested document.

The General Court held<sup>9</sup> that there was no longer any need to adjudicate on the appellant's action lodged against the latter decision, since, following the disclosure by its addressee, on the internet, of the document access to which the appellant had requested, those proceedings had become devoid of purpose.

Hearing an appeal brought by the appellant, the Court set aside the order of the General Court and referred the case back to that court.

#### Findings of the Court of Justice

Relying on its case-law,<sup>10</sup> the Court of Justice held that, even if the document at issue has been disclosed by a third party, the decision at issue has not been formally withdrawn by the Parliament, and therefore the action retained its purpose.

In order to ascertain whether the General Court should have ruled on the substance of the action, the Court examines whether the appellant, notwithstanding the disclosure of the document at issue by a third party, retained her interest in bringing proceedings. As a preliminary observation, the Court notes that, while it is true that an interest in bringing proceedings, which must continue until the final decision is delivered failing which there will be no need to adjudicate, constitutes a procedural condition independent of the substantive law applicable to the substance of the case, it cannot however be detached from that law. Thus, taking into account the fact that the request for access made by the appellant was based on Regulation No 1049/2001,<sup>11</sup> the Court recalls that that regulation, which is based on the principle of openness, seeks to confer on the public as wide a right of access as possible to documents of the institutions. The Court states that the regulation establishes, first, the right, in principle, for any person to access documents of an institution and, second, the obligation, in principle, of an institution to grant access to its documents. The exceptions to the right of access to documents of the institutions are listed exhaustively therein.

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<sup>7</sup> European Parliament Decision of 8 July 2015, A(2015) 4931.

<sup>8</sup> European Parliament Decision A(2016) 15112.

<sup>9</sup> Order of 20 September 2018, *Leino-Sandberg v Parliament* (T-421/17, not published, EU:T:2018:628).

<sup>10</sup> Judgment of 4 September 2018, *ClientEarth v Commission* (C-57/16 P, EU:C:2018:660).

<sup>11</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).



Next, the Court of Justice noted that, even though, according to the provisions of Regulation No 1049/2001,<sup>12</sup> the institution concerned may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document if the document has already been released by the institution concerned and is easily accessible, that is not the case if the document of an institution has been disclosed by a third party. In that regard, the Court stresses that a document disclosed by a third party cannot be regarded as constituting an official document, or as expressing the official position of the institution in the absence of an unequivocal endorsement by that institution according to which the document obtained emanates from it and expresses its official position.

The Court holds that, in a situation where the appellant has only obtained access to the document at issue disclosed by a third party and where the Parliament continues to refuse to grant her access to the requested document, it cannot be considered that the appellant has obtained access to that document, within the meaning of Regulation No 1049/2001, nor that, therefore, she no longer has any interest in seeking the annulment of the decision at issue solely as a result of that disclosure. On the contrary, in such circumstances, the appellant retains a genuine interest in obtaining access to an authenticated version of the requested document, within the meaning of Article 10(1) and (2) of the regulation, guaranteeing that that institution is the author and that the document expresses its official position.

Consequently, the Court of Justice finds that the General Court erred in law in treating the disclosure of a document by a third party as being the same as disclosure by the institution concerned of the requested document and in having concluded that there was no longer any need to adjudicate on the appellant's action on the ground that, since the document had been disclosed by a third party, the appellant could access it and use it in a way which is as lawful as if she had obtained it as a result of her application under the regulation.

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<sup>12</sup> Article 10(1) and (2) of Regulation No 1049/2001.

### III. BORDER CHECKS, ASYLUM AND IMMIGRATION

#### 1. ASYLUM POLICY

##### Judgment of the Court (Second Chamber) of 20 January 2021

[Case C-255/19](#)

[Secretary of State for the Home Department](#)

Reference for a preliminary ruling – Directive 2004/83/EC – Minimum standards for granting refugee status or subsidiary protection status – Refugee status – Article 2(c) – Cessation of refugee status – Article 11 – Change in circumstances – Article 11(1)(e) – Possibility of availing oneself of the protection of the country of origin – Criteria for assessment – Article 7(2) – Financial and social support – Irrelevant

OA is a Somali national who is a member of the minority Reer Hamar clan. In the course of the 1990s, OA and his wife were the victims of persecution at the hands of the militia of the majority Hawiye clan. Because of that persecution, they fled Somalia in 2001 and OA's wife obtained refugee status in the United Kingdom. In 2003 OA joined her and also obtained that status, as a dependent of his wife.

However, in September 2016 the Secretary of State for the Home Department (United Kingdom) revoked OA's refugee status on the ground that the minority clans are no longer subject to persecution, and that the State offers effective protection. In that regard, under Directive 2004/83 ('the Qualification Directive'),<sup>13</sup> refugee status comes to an end when the circumstances that justified recognition of that status have ceased to exist, and the person concerned can then no longer continue 'to refuse to avail himself or herself of the protection of the country of nationality'.<sup>14</sup> OA then brought against that decision an action which is now to be examined by the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom). He claims that he continues to have a fear of persecution and that the Somali authorities are not able to protect him. Further, he submits that it cannot be inferred that there is sufficient 'protection' in his country of origin from the fact that social and financial support is provided by his family or other members of his clan, who are private and not State actors.

In that context, the national court hearing the action decided to refer questions to the Court, in order to determine, in essence, whether social and financial support that may be provided by private actors, such as the family or the clan, can permit the conclusion that there exists 'protection' within the meaning of the Qualification Directive and whether such support is of relevance to the assessment of the effectiveness or availability of the 'protection' provided by the State or to the determination of whether there continues to be a well-founded fear of persecution. Further, that court seeks to ascertain whether the criteria governing the examination of that protection, made when analysing the cessation of refugee status, are the same criteria as applied in relation to the granting of that status.

##### Findings of the Court

First, the Court holds that the requirements to be met by the 'protection' to which the provisions of the Qualification Directive refer in relation to the cessation of refugee status must be the same as those which arise from the provisions in relation to the granting of that status.<sup>15</sup> In that regard, the

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<sup>13</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12, and corrigendum, OJ 2005 L 204, p. 24). That directive was repealed with effect from 21 December 2013 by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

<sup>14</sup> See Article 11(1)(e) of the Qualification Directive.

<sup>15</sup> See, respectively, Article 11(1)(e) and Article 2(c) of the Qualification Directive. With respect to the requirements in question, see Article 7(1) and (2) of that directive.





Court emphasises the parallelism between the granting and the cessation of refugee status. The Qualification Directive provides that refugee status is to be lost when the conditions governing the granting of refugee status are no longer met. Thus, the circumstances which demonstrate the country of origin's inability or, conversely, its ability to provide protection from acts of persecution constitute a crucial element in the assessment which leads to the granting of refugee status, or, correspondingly, when appropriate, to the cessation of that status. Such cessation thus implies that the change in circumstances has remedied the reasons which led to the recognition of refugee status.

Second, the Court states that any social and financial support provided by private actors, such as the family or the clan of a third country national, falls short of what is required under the provisions of the Qualification Directive to constitute protection. Consequently, that support is of no relevance either to the assessment of the effectiveness or availability of the protection provided by the State,<sup>16</sup> or to the determination of whether there continues to be a well-founded fear of persecution.<sup>17</sup>

To reach that conclusion, first, the Court states that protection from acts of persecution is generally considered to be provided when the State itself, or the parties or organisations controlling the State or a substantial part of the territory of that State, take reasonable steps to prevent such acts of persecution, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of such acts of persecution, and the applicant has access to such protection. Further, the Court states that, in order to constitute acts of persecution, the relevant acts must be sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights, or be an accumulation of various measures that are sufficiently severe to affect an individual in a similar manner to a severe violation of basic human rights. The Court holds that mere social and financial support from the family or a clan is inherently incapable of either preventing or punishing acts of persecution and cannot, therefore, be regarded as providing the protection required from those acts. That is particularly the case where the objective of that social and financial support is not to protect a third country national concerned from such acts, but rather to ensure his or her reintegration in his or her country of origin.

Consequently, the Court finds, next, that such social and financial support is of no relevance to the assessment of the effectiveness or availability of the protection provided by the State. The Court notes, in that regard, that economic hardship cannot, as a general rule, be classified as 'persecution',<sup>18</sup> and, consequently, such support intended to remedy such hardship should not have any bearing on the assessment of the adequacy of the State protection from acts of persecution. Further, the Court adds that even if the clans were to provide – in addition to such social and financial support – protection in terms of security, that protection could not, in any event, be taken into account in order to ascertain that the State protection meets the requirements that arise from the Qualification Directive.

Last, the Court holds that a person's fear of persecution cannot be excluded, irrespective of what is required to constitute protection under the Qualification Directive, by the fact that social and financial support is provided by his or her family or clan. The Court considers that the conditions on refugee status in relation to, on the one hand, the fear of persecution in his or her country of origin and, on the other, to protection from acts of persecution, are intrinsically linked. Consequently, in order to determine whether that fear is well-founded, it is necessary to take into account whether there is or is not protection from such acts. However, that protection permits the inference that there is no such fear only if it meets the requirements arising from the Qualification Directive.<sup>19</sup> Since the conditions relating to the fear of persecution and to protection from acts of persecution are intrinsically linked, their examination cannot be subject to a separate criterion of protection; their assessment must be made in the light of the requirements laid down in that directive. The Court holds that to adopt an interpretation to the effect that the protection existing in the third country of origin may rule out a

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<sup>16</sup> See Article 7(1)(a) of the Qualification Directive.

<sup>17</sup> See Article 11(1)(e) of the Qualification Directive, read together with Article 2(c) thereof.

<sup>18</sup> See Article 9 of the Qualification Directive.

<sup>19</sup> See, in particular, Article 7(2) of the Qualification Directive.

well-founded fear of persecution even though that protection does not satisfy those requirements would be liable to call into question the minimum requirements laid down by that directive.

## 2. IMMIGRATION POLICY

### Judgment of the Court (First Chamber) of 14 January 2021

[Case C-441/19](#)

[Staatssecretaris van Justitie en Veiligheid \(Retour d'un mineur non accompagné\)](#)

Reference for a preliminary ruling – Area of freedom, security and justice – Directive 2008/115/EC – Common standards and procedures in Member States for returning illegally staying third-country nationals – Article 5(a), Article 6(1) and (4), Article 8(1) and Article 10 – Return decision issued against an unaccompanied minor – Best interests of the child – Obligation for the Member State concerned to be satisfied, before the adoption of a return decision, that that minor will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return – Distinction on the basis solely of the criterion of the age of the minor in order to grant a right of residence – Return decision not followed by removal measures

In June 2017, TQ, an unaccompanied minor who was then 15 years and four months old, applied in the Netherlands for a fixed-term residence permit on grounds of asylum. In the context of that application, TQ stated that he was born in Guinea in 2002. Following the death of his aunt with whom he lived in Sierra Leone, TQ came to Europe. In Amsterdam (Netherlands), he claims to have been the victim of human trafficking and sexual exploitation, as a result of which he now suffers serious psychological problems. In March 2018, the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands, 'the State Secretary') decided *ex officio* that TQ was not eligible for a fixed-term residence permit, the referring court specifying that TQ does not qualify for refugee status or subsidiary protection. In accordance with Netherlands law, the decision of the State Secretary constitutes a return decision.

In April 2018, TQ brought an appeal against that decision before the referring court, claiming *inter alia* that he does not know where his parents live, that he would not be able to recognise them upon his return, that he does not know any other family members and that he does not even know whether he has any such members.

The referring court explains that the Netherlands legislation draws a distinction based on the age of the unaccompanied minor. As regards minors under the age of 15 on the date on which the asylum application is lodged, an investigation as to whether there are adequate reception facilities in the State of return, provided for in Article 10 of Directive 2008/115,<sup>20</sup> is carried out before a decision on that application is adopted, those minors being granted an ordinary residence permit where there are no such reception facilities. For minors aged 15 years or more on the date on which the asylum application is lodged, like TQ, such an investigation is not carried out, the Netherlands authorities appearing to wait until the minors in question reach the age of 18 in order subsequently to implement the return decision. Thus, during the period between his or her application for asylum and reaching the age of majority, the residence of an unaccompanied minor aged 15 years or more is irregular but tolerated in the Netherlands.

It is in that context that the referring court decided to refer questions to the Court on whether the distinction drawn by the Netherlands legislation between unaccompanied minors over the age of 15 years and those under the age of 15 years is compatible with EU law.

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<sup>20</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98; 'the "Return" Directive').





## Findings of the Court

The Court states that, where a Member State intends to issue a return decision against an unaccompanied minor under the 'Return' Directive, it must necessarily take into account the best interests of the child<sup>21</sup> at all stages of the procedure, which entails a general and in-depth assessment of the situation of that minor being carried out. According to the Court, if the Member State concerned adopts a return decision without first being satisfied that there are adequate reception facilities in the State of return, the consequence would be that, although that minor was the subject of a return decision, he or she could not be removed in the absence of such facilities. Such a minor would thus be placed in a situation of great uncertainty as to his or her legal status and his or her future, in particular as regards his or her schooling, his or her link with a foster family or the possibility of remaining in the Member State concerned; this would be contrary to the requirement to protect the best interests of the child at all stages of the procedure. It follows that, if such reception facilities are not available in the State of return, the minor concerned cannot be the subject of a return decision.

The Court states, in that context, that the age of the unaccompanied minor in question constitutes only one factor among others in order to ascertain whether there are adequate reception facilities in the State of return and to determine whether the best interests of the child must result in a return decision against that minor not being issued. Accordingly, the Court states that a Member State may not distinguish between unaccompanied minors solely on the basis of the criterion of their age for the purpose of ascertaining whether there are such facilities.

The Court also holds that, in the light of the obligation for Member States to issue a return decision against any third-country national staying illegally on their territory<sup>22</sup> and to remove him or her<sup>23</sup> as soon as possible, the 'Return' Directive precludes a Member State, after it has adopted a return decision in respect of an unaccompanied minor and has been satisfied that there are adequate reception facilities in the State of return, from refraining from subsequently removing that minor until he or she reaches the age of 18 years. In such a case, the minor concerned must be removed from the territory of the Member State concerned, subject to any changes in his or her situation. In the latter respect, the Court states that, in the event that adequate reception facilities in the State of return are no longer guaranteed at the stage of the removal of the unaccompanied minor, the Member State concerned would not be able to enforce the return decision.

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<sup>21</sup> See Article 5(a) of the 'Return' Directive.

<sup>22</sup> See Article 6(1) of the 'Return' Directive.

<sup>23</sup> See Article 8 of the 'Return' Directive.

## IV. JUDICIAL COOPERATION IN CRIMINAL MATTERS

### Judgment of the Court (Fifth Chamber) of 28 January 2021

[Case C-649/19](#)

[Spetsializirana prokuratura \(Déclaration des droits\)](#)

Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive 2012/13/EU – Articles 4 to 7 – Letters of Rights set out in Annexes I and II – Framework Decision 2002/584/JHA – Right to information in criminal proceedings – Letter of Rights on arrest – Right to be informed of the accusation – Right of access to the materials of the case – Person arrested on the basis of a European arrest warrant in the executing Member State

The Spetsializirana prokuratura (Specialised Public Prosecutor's Office, Bulgaria) brought criminal proceedings against IR, who is accused of having participated in a criminal group for the purpose of committing tax offences. During the pre-trial stage of the criminal proceedings, IR, as an 'accused person', was informed of only some of his rights. However, when the trial stage of the criminal proceedings commenced in February 2017, IR could not be found. In April 2017, the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) adopted a pre-trial detention measure in respect of him; that measure constituted a national arrest warrant. In May 2017, as IR had still not been found, a European arrest warrant (EAW) was issued. Nevertheless, since it had doubts regarding the compatibility of that EAW with EU law, the Spetsializiran nakazatelen sad (Specialised Criminal Court) annulled it.

Having decided to issue a new EAW in respect of IR, that court seeks clarification as regards the information to be attached to that warrant, in order to ensure observance of the rights provided for by the Directive on the right to information in criminal proceedings ('Directive 2012/13').<sup>24</sup> More specifically, that court seeks to ascertain whether persons who are arrested for the purposes of the execution of an EAW can rely, in addition to the rights expressly conferred on them by Directive 2012/13, on the rights of 'suspects or accused persons who are arrested or detained' within the meaning of that directive. Should that question be answered in the negative, the Spetsializiran nakazatelen sad (Specialised Criminal Court) questions the validity of the Framework Decision on the EAW,<sup>25</sup> in the light of the right to liberty and the right to an effective remedy enshrined in Articles 6 and 47, respectively, of the Charter of Fundamental Rights of the European Union ('the Charter'). The information communicated to persons arrested for the purposes of the execution of an EAW on the basis of the Framework Decision on the EAW is more limited than the information communicated to suspects or accused persons who are arrested or detained in accordance with Directive 2012/13, so that that court questions whether it would not become impossible or excessively difficult for persons arrested for the purposes of the execution of an EAW to challenge warrants issued against them.

#### Findings of the Court

In the first place, the Court states that the rights of suspects or accused persons who are arrested or detained provided for by Directive 2012/13 do not apply to persons who are arrested for the purposes of the execution of an EAW. Those rights include, inter alia, the right to be provided with a written Letter of Rights on arrest, which must contain information about the possibility of challenging the lawfulness of the arrest, obtaining a review of the detention, or making a request for provisional

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<sup>24</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1).

<sup>25</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('the Framework Decision on the EAW').

release.<sup>26</sup> Also included are the right to information about the accusation<sup>27</sup> and the right of access to the materials of the case that are essential to challenging the lawfulness of the arrest or detention.<sup>28</sup>

In order to reach that conclusion, and after finding that an analysis of the wording of the provisions of Directive 2012/13 conferring those various rights did not, in itself, enable it to be determined whether the persons who are arrested for the purposes of the execution of an EAW are included in the suspects or accused persons who are arrested or detained within the meaning of that directive and to whom those rights apply, the Court analyses, first, the context of those provisions. In that regard, it states that Directive 2012/13 contains other provisions which expressly concern the rights of persons who are arrested for the purposes of the execution of an EAW.<sup>29</sup> Moreover, references in Directive 2012/13 to suspects or accused persons who are arrested or detained should be understood to refer to any situation where those suspects or persons are deprived of liberty within the meaning of Article 5(1)(c) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR').<sup>30</sup> Such a situation is different from the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition, also referred to in the ECHR,<sup>31</sup> and which corresponds to the case of an EAW. For the Court, it follows from this that the provisions referring to suspects or accused persons who are arrested or detained do not concern persons who are arrested for the purposes of the execution of an EAW.

Second, the Court considers that that interpretation is confirmed by the fact that Directive 2012/13 sets out a twofold objective.<sup>32</sup> It lays down minimum standards to be applied in the field of information to be given to suspected or accused persons, in order to enable them to prepare their defence and to safeguard the fairness of the proceedings. It also seeks to preserve the specific characteristics of the procedure relating to EAWs, which is characterised by a desire to simplify and expedite the surrender procedure.

In the second place, the Court confirms the validity of the Framework Decision on the EAW in the light of Articles 6 and 47 of the Charter, which enshrine the right to liberty and the right to an effective remedy, respectively.

In that regard, the Court recalls, first of all, that, since the issuing of an EAW is capable of impinging on the right to liberty of the person concerned, the protection of procedural rights and fundamental rights that that person must enjoy means that a decision meeting the requirements of effective judicial protection should be adopted either when the national arrest warrant is adopted or when the EAW is issued.

Next, the Court emphasises that the person who is the subject of an EAW issued for the purposes of criminal prosecution acquires, from the moment of his or her surrender, the status of 'accused person' within the meaning of Directive 2012/13. Thus, from that moment, that person enjoys all the rights associated with that status, so that he or she can prepare his or her defence and safeguard the fairness of the proceedings.

As regards the period preceding that surrender, first, the Court states that the Framework Decision on the EAW provides that an EAW must contain information concerning the nature and legal classification of the offence and a description of the circumstances in which the offence was committed.<sup>33</sup> That information corresponds, in essence, to the information referred to in the

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<sup>26</sup> See Article 4 of Directive 2012/13, in particular Article 4(3) thereof.

<sup>27</sup> See Article 6(2) of Directive 2012/13.

<sup>28</sup> See Article 7(1) of Directive 2012/13.

<sup>29</sup> See Article 5 of Directive 2012/13. See also Annex II to that directive, which sets out the indicative model Letter of Rights for persons arrested on the basis of an EAW; that model letter is distinct from the indicative model Letter of Rights to be provided to suspects and accused persons who are arrested or detained, set out in Annex I thereto and referred to in Article 4 of Directive 2012/13.

<sup>30</sup> See recital 21 of Directive 2012/13.

<sup>31</sup> See Article 5(1)(f) of the ECHR.

<sup>32</sup> See Article 1 of the directive, read in conjunction with recitals 14, 27 and 39 thereof.

<sup>33</sup> See Article 8(1)(d) and (e) of the Framework Decision on the EAW.

provisions of Directive 2012/13 concerning the right of suspects or accused persons to information about the accusation.<sup>34</sup> Second, the Court recalls that the right to effective judicial protection does not require that the right to challenge the decision to issue an EAW can be exercised before the surrender of the person concerned. Consequently, the mere fact that the person in question is not informed about the remedies available in the issuing Member State and is not given access to the materials of the case until after he or she is surrendered to the competent authorities of that Member State cannot result in any infringement of the right to effective judicial protection.

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<sup>34</sup> See Article 6 of Directive 2012/13.

## V. COMPETITION

### Judgment of the Court (Second Chamber) of 21 January 2021

[Case C-308/19](#)

[Whiteland Import Export](#)

Reference for a preliminary ruling – Competition – Penalties imposed by the national competition authority – Limitation period – Actions interrupting the limitation period – National legislation precluding, after the initiation of an investigation, the possibility that subsequent action for the purpose of proceedings or investigation may interrupt the new limitation period – Principle that national law must be interpreted in conformity with EU law – Regulation (EC) No 1/2003 – Article 25(3) – Scope – Article 4(3) TEU – Article 101 TFEU – Principle of effectiveness

On 7 September 2009, the Consiliul Concurenței (Competition Authority, Romania) commenced an investigation on the retail food market against several undertakings, including Whiteland Import Export SRL ('Whiteland'), in order to ascertain whether those undertakings had infringed the rules of competition law, in particular those laid down in Article 101 TFEU. The undertakings were accused of having concluded anticompetitive agreements between 2006 and 2009 aimed at distorting and impeding competition on the relevant market, by fixing the selling and resale price of the suppliers' products. By decision of 14 April 2015, the Competition Authority imposed fines on them.

Finding that, under the national rules applicable, the limitation period had expired when the Competition Authority adopted its decision, the Curtea de Apel București (Court of Appeal, Bucharest, Romania), hearing an action brought by Whiteland, annulled that decision in so far as it concerned that company. After finding that the limitation period had started to run on 15 July 2009, the date on which the infringement of which Whiteland was accused had ended, that court held that the decision of 7 September 2009 to initiate the investigation had interrupted the limitation period and caused a new limitation period to start to run, expiring on 7 September 2014. It stated that, under a strict interpretation of the national rules governing limitation periods, the measures taken by the Competition Authority after the decision to initiate the investigation were not capable of interrupting the new limitation period and, therefore, that decision is the last action of that authority which is capable of interrupting that period. In addition, that same court held that Article 25(3) of Regulation No 1/2003,<sup>35</sup> concerning the interruption of the limitation period, applied only to the European Commission and did not govern limitation periods for the imposition of fines by national competition authorities

It is in that context that the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania, 'the referring court'), hearing an appeal brought by the Competition Authority against the judgment of the Curtea de Apel București (Court of Appeal, Bucharest), asked the Court of Justice, in essence, whether national courts are required to apply Article 25(3) of Regulation No 1/2003 to the time-barring of a national competition authority's powers to impose penalties for infringements of EU competition law. The referring court also requested the Court of Justice to clarify, in essence, whether Article 4(3) TEU and Article 101 TFEU, read in the light of the principle of effectiveness, must be interpreted as precluding national legislation, as interpreted by the national courts having jurisdiction, according to which the decision to initiate an investigation, adopted by the national competition authority, concerning an infringement of EU competition law rules, is the final action of that authority which may have the effect of interrupting the limitation period relating to its power to impose penalties and excludes any subsequent action, for the purpose of proceedings or the investigation, from interrupting that period.

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<sup>35</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1).

## Findings of the Court

As regards the first question, the Court states that national courts are not required to apply Article 25(3) of Regulation No 1/2003 to the time-barring of a national competition authority's powers to impose penalties for infringements of EU competition law.

In that regard, it points out that, in the present case, the possible relevance of Article 25(3) of Regulation No 1/2003 – according to which any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement is to interrupt the limitation period for the imposition of fines or periodic penalty payments – depends entirely on whether that provision is applicable to the factual situation in the main proceedings. The Court finds that, in the light of the context of which that provision forms part and its purpose, the provision governs only the powers available to the Commission in relation to penalties. It follows that that same provision does not lay down limitation rules relating to the national competition authorities' powers to impose penalties.

As regards the second question, the Court notes, at the outset, that, in the absence of binding regulation under EU law on the subject, it is for Member States to establish and apply national rules on limitation periods for the imposition of penalties by national competition authorities, including the procedures for suspension and/or interruption. However, the establishment and application of those rules may not render the implementation of EU law impossible in practice or excessively difficult.

Consequently, for the purposes of not detracting from the full and uniform application of EU law and not introducing or maintaining in force measures which may render ineffective the competition rules applicable to undertakings, the Court makes clear that Member States must ensure that national rules laying down limitation periods are devised in such a way as to strike a balance between, on the one hand, the objectives of providing legal certainty and ensuring that cases are dealt with within a reasonable time as general principles of EU law and, on the other, the effective and efficient application of Articles 101 and 102 TFEU, in order to safeguard the public interest in preventing the operation of the internal market being distorted by agreements or practices harmful to competition.

The Court notes that account must be taken of the specific features of competition law cases and in particular of the fact that those cases require, in principle, a complex factual and economic analysis. Consequently, national legislation laying down the date from which the limitation period starts to run, the duration of that period and the rules for suspending or interrupting it must be adapted to the specific features of competition law and the objectives of applying the rules of that law by the persons concerned, so as not to prejudice the full effectiveness of the EU competition law rules. The Court also finds that national rules on limitation which, for reasons inherent to them, are systematically an obstacle to the imposition of effective and dissuasive penalties for infringements of EU competition law are liable to render application of the rules of that law impossible in practice or excessively difficult.

In the present case, according to a strict interpretation of the national rules governing limitation periods at the material time – adopted in some of the national case-law, and in particular by the Curtea de Apel București (Court of Appeal, Bucharest) in the context of the main proceedings – the decision to initiate an investigation for the purpose of proceedings or investigation in respect of an infringement of the rules of competition law is the final action of the national competition authority which may have the effect of interrupting the limitation period relating to its power to impose penalties; none of the actions subsequently taken for the purpose of the investigation or proceedings in respect of the infringement can interrupt that period, even if the taking of such forms of action would constitute an important stage in the investigation and show that authority's willingness to prosecute the infringement.

In those circumstances, the Court concludes that such a strict interpretation of the national legislation appears likely to compromise the effective application of the rules of EU law by national competition authorities. Indeed, such an interpretation, totally prohibiting the limitation period from being interrupted by action taken subsequently in the course of the investigation, could present a systemic risk that acts constituting infringements of EU law may go unpunished. It is, however, for the referring court to determine whether that is the case here.



If that should prove to be the case, the Court finds that it is for the referring court to interpret the national legislation at issue so far as at all possible in the light of EU law, and particularly the rules of EU competition law, as interpreted by the Court, or, as necessary, disappling that legislation.

In that regard, the Court notes that the question whether a national provision must be disapplied, in so far as it conflicts with EU law, arises only if no interpretation of that provision in conformity with EU law proves possible.

However, in the present case, it is apparent from the order for reference that such an interpretation appears possible, which it is, however, for the referring court ultimately to ascertain.

### **Judgment of the Court (Second Chamber) of 27 January 2021**

[Case C-595/18 P](#)

[The Goldman Sachs Group v Commission](#)

Appeal – Competition – Agreements, decisions and concerted practices – European market for power cables – Market allocation in connection with projects – Regulation (EC) No 1/2003 – Article 23(2) – Attributability of unlawful conduct of one company to another company – Presumption of actual exercise of decisive influence – Entity controlling 100% of the voting rights associated with the shares of another company

The Goldman Sachs Group ('the appellant') is a company established in the United States. It is an investment bank which operates in all the major financial centres around the world. From 29 July 2005 to 28 January 2009 ('the infringement period'), it was the (indirect) parent company, through certain funds which it had established, of Prysmian SpA and its wholly owned subsidiary, Prysmian Cavi e Sistemi Srl, two companies established in Italy, which together form the Prysmian group, one of the leading businesses worldwide in the submarine and underground power cables sector. While its shareholding in Prysmian was initially 100% of the shares, it subsequently decreased to 84.4% when part of Prysmian's capital was floated on the stock exchange on 3 May 2007.<sup>36</sup>

Following an investigation initiated in 2008, the Commission, by decision of 2 April 2014<sup>37</sup> ('the decision at issue'), (i) found that there had been a single and continuous infringement of Article 101 TFEU in the 'sector for (extra) high voltage underground and/or submarine power cables' consisting in an allocation of the worldwide market between the main European, Japanese and South Korean producers concerned and (ii) imposed fines for their participation in the cartel at issue.

The appellant was found liable as Prysmian's parent company during the infringement period, and a distinction was drawn between the situation that prevailed until a part of Prysmian's capital was floated on the stock exchange and the subsequent situation. Thus, as regards the first period, the Commission found that the appellant had remained in a situation similar to that of a sole and exclusive owner, despite the divestments of shares, so that it could be presumed, in accordance with the case-law principles established by the Court of Justice,<sup>38</sup> that it had exercised decisive influence over Prysmian's market conduct. Furthermore, as regards the entire infringement period, the Commission relied on a body of evidence revealing the economic, organisational and legal links between the appellant and Prysmian in order to conclude that such decisive influence had actually been exercised.

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<sup>36</sup> During the infringement period, the period prior to the floatation on the stock exchange of part of Prysmian's capital will be referred to below as 'the first period'.

<sup>37</sup> Commission Decision C(2014) 2139 final of 2 April 2014 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39610 – Power cables).

<sup>38</sup> Judgment of 10 September 2009, *Akzo Nobel and Others v Commission* (C-97/08 P, EU:C:2009:536, paragraph 58). See also judgments of 24 June 2015, *Fresh Del Monte Produce v Commission* and *Commission v Fresh Del Monte Produce* (C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 75 and the case-law cited), and of 28 October 2020, *Pirelli & C. v Commission* (C-611/18 P, not published, EU:C:2020:868, paragraph 68 and the case-law cited).

Disputing the approach followed by the Commission in order to impute to it liability for the infringement at issue, Goldman Sachs brought an action before the General Court (i) for annulment of the decision at issue in so far as it concerned it and (ii) for the reduction of the amount of the fine which had been imposed on it; that action was dismissed in its entirety by judgment of General Court of 12 July 2018.<sup>39</sup> In its judgment of 27 January 2021, the Court of Justice dismisses the appeal lodged by Goldman Sachs against the judgment of the General Court. In that context, the Court of Justice provides further clarifications on the conditions required for the liability of parent companies to be incurred where their subsidiaries have infringed the competition rules.

#### Findings of the Court of Justice

In the first place, the Court of Justice holds that the General Court was fully entitled to take the view that, where a parent company holds all the voting rights associated with its subsidiary's shares, the Commission is entitled to rely on a presumption that the parent company actually exercises decisive influence over its subsidiary's market conduct. The Court of Justice recalls that the presumption of actual exercise of decisive influence as enshrined in its case-law is intended to enable the parent company to be held liable for the conduct of its subsidiary, unless it is able to demonstrate that the subsidiary acts independently on the market. Thus, the implementation of that presumption does not require the Commission to produce indicia capable of establishing the actual exercise of such influence. In that regard, the Court of Justice specifies that it is not the mere holding of all or virtually all the capital of the subsidiary in itself that gives rise to the presumption, but the degree of control of the parent company over its subsidiary resulting from this. Where a parent company holds all the voting rights associated with its subsidiary's shares, without however being the sole shareholder of that subsidiary, it is able to exercise decisive influence over the conduct of the latter. Observing that it was not disputed that the appellant held all the voting rights associated with its subsidiary's shares, the Court of Justice concludes that the criticism made of the General Court in the appeal for having treated such a situation in the same way as that of a company holding all or virtually all of the capital of its subsidiary is not justified in the light of the conditions for applying the presumption of actual exercise of decisive influence.

In the second place, as regards the examination of the elements on which the Commission relied in order to conclude that the appellant had exercised decisive influence over its subsidiary's market conduct during the entire infringement period, the Court of Justice notes that the Commission relied, as regards the first period, on two grounds in order to hold the appellant liable for the infringement, namely a presumption of actual exercise of decisive influence, on the ground that the appellant held all the voting rights associated with Prysmian's shares, and its conclusion that the appellant had actually exercised such influence over Prysmian. Given that the Commission was entitled to rely on such a presumption, as is apparent from the foregoing, and since the General Court did not err in law in finding that the appellant had not succeeded in rebutting that presumption, the Court of Justice considers that the appeal is ineffective in so far as it concerns the General Court's findings as regards the second ground on which the Commission relied in order to hold the appellant liable for the infringement at issue in that period.

As regards the period after the flotation of a part of Prysmian's capital on the stock exchange, the Court of Justice holds that the General Court did not err in law in finding that personal links between the parent company and its subsidiary other than those resulting from an accumulation of posts could be relevant in that regard, since such links are capable of establishing the existence of a single economic entity. The General Court was therefore right to accept that personal links relating to the exercise, by the director of a company, of consultancy activities for the other company are relevant.

Lastly, the Court of Justice observes that no reduction of the fine was granted to Prysmian on account of the unsuccessful nature of the appeal lodged by the companies in that group,<sup>40</sup> with the result that the appellant was not eligible for such a reduction. Consequently, the appeal is dismissed in its entirety.

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<sup>39</sup> Judgment of 12 July 2018, *The Goldman Sachs Group v Commission* (T-419/14, EU:T:2018:445).

<sup>40</sup> Judgment of 12 July 2018, *Prysmian and Prysmian Cavi e Sistemi v Commission* (T-475/14, EU:T:2018:448), upheld by the judgment of 24 September 2020, *Prysmian and Prysmian Cavi e Sistemi v Commission* (C-601/18 P, EU:C:2020:751).

## VI. APPROXIMATION OF LAWS – CHEMICALS

### Judgment of the Court (Third Chamber) of 21 January 2021

[Case C-471/18 P](#)

[Germany v Esso Raffinage](#)

Appeal – Registration, evaluation and authorisation of chemicals – Regulation (EC) No 1907/2006 (REACH) – Articles 5 and 6 – General obligation to register substances – Articles 41 and 42 – Evaluation of registration dossiers and compliance check of information submitted by registrants – Declaration of non-compliance – Actionable measure – Interest in bringing proceedings – Locus standi – Respective competences of the European Chemicals Agency (ECHA) and national authorities – Obligation on ECHA to check the compliance of additional information submitted by registrants at its request – ECHA's power to take an appropriate decision – Article 1 – Objective of protecting human health and the environment – Articles 13 and 25 – Use of animal testing – Promotion of alternative methods

Esso Raffinage ('Esso') submitted to the European Chemicals Agency (ECHA) an application for registration of a substance it manufactures.

By decision of 6 November 2021, ECHA requested that Esso provide it with additional information before the expiry of one year. In reply, Esso provided ECHA with information other than that requested, but which it considered to be alternative to that information.

On 1 April 2015, ECHA sent to the ministère de l'Écologie, du Développement durable, des Transports et du Logement (Ministry of Ecology, Sustainable Development, Transport and Housing, France) a letter headed 'Statement of non-compliance following a dossier evaluation decision under Regulation (EC) No 1907/2006' ('the letter at issue'). In that letter, ECHA stated that Esso had not met its obligations.<sup>41</sup>

The General Court upheld Esso's action, after declaring it admissible, and annulled the letter at issue. The Court, to which an appeal was brought by the Federal Republic of Germany, has dismissed the appeal, clarifying the scope of ECHA's power to take decisions following a compliance check of information contained in substance registration dossiers.

#### Findings of the Court

In the first place, the Court reviews the General Court's findings relating to the admissibility of Esso's action, in particular as regards whether the letter at issue is open to challenge. In that regard, the Court points out, first of all, that, in order to determine whether an act is intended to produce binding legal effects, account may be taken of objective criteria, such as the content of the act in question, the context in which it was adopted and the powers of the body which adopted it, and of a subjective criterion relating to the intention that led the institution, body, office or agency of the Union which drafted the contested act to adopt it. However, that subjective criterion can play only a complementary role as compared with the objective criteria referred to above and, therefore, cannot be given greater weight than those objective criteria, nor can it affect the assessment of the effects of the resulting contested act.

Next, the Court states that, by providing that ECHA may adopt 'any appropriate decisions',<sup>42</sup> the EU legislature has conferred on ECHA the power to draw legally binding conclusions from the evaluation of the information submitted by a registrant who has previously been notified of a decision asking it

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<sup>41</sup> Those obligations arise from the decision of 6 November 2012 and from Article 5 and Article 41(4) of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1 and corrigendum OJ 2007 L 136, p. 3) ('the REACH Regulation').

<sup>42</sup> Article 42(1) of the REACH Regulation.

to bring its registration dossier into compliance with the requirements of the REACH Regulation.<sup>43</sup> ECHA is therefore able to decide whether the information in question complies with those requirements and whether the registrant has complied with the corresponding obligations. Those obligations include not only the obligation to comply with the decision requiring the submission of that information, but ultimately also include the obligation on manufacturers and importers of substances in quantities of one tonne or more per year<sup>44</sup> to comply with all the requirements applicable to the registration of those substances. In that regard, the Court points out that the EU legislature established the substance registration and evaluation system in order to allow ECHA to determine that industry is meeting its obligations, subject to penalties if those obligations are not met. In that context, it is for the Member States to establish a system of penalties applicable to the undertakings concerned and to take the measures necessary to ensure that they are implemented,<sup>45</sup> in the event that ECHA finds that those undertakings have infringed the obligations arising from the REACH Regulation.<sup>46</sup> The Court concludes that the General Court was therefore right to find that it is ECHA and not, as the Federal Republic of Germany submits in its appeal, the Member States, which has the power to adopt a decision declaring that those obligations have been infringed, such as that contained in the letter at issue.

Finally, the Court notes that that analysis of the allocation of competences between ECHA and the Member States is supported by the objectives of the REACH Regulation, which introduces an integrated system for monitoring chemical substances that are manufactured, imported or placed on the market in the Union, with the aim of ensuring a high level of protection of human health and the environment. One of the essential elements of that system is the establishment of ECHA, a central and independent entity responsible for, first, receiving applications for registration of those substances and updates to those applications, next, checking that they are complete and rejecting them if they are incomplete and, lastly, checking the compliance of the information they contain with the relevant requirements, if necessary after they are completed.<sup>47</sup>

In the second place, the Court examines the General Court's findings relating to ECHA's exercise of its decision-making powers. In that regard, the Court states, first of all, that the obligation on ECHA to evaluate substance registration dossiers that are submitted to it and to check the compliance of the information contained therein relates, if a registrant has submitted 'adaptations to the standard information requirements', to the question whether those adaptations and their justifications comply with the rules governing them. Every registrant has the possibility to submit, with their registration dossier, alternative information to the 'standard information' required, referred to as 'adaptations', subject to compliance with the requirements governing such adaptations. Next, the Court notes that the possibility for registrants to have recourse to such 'adaptations' at subsequent stages of the procedure for the registration and evaluation of substances, in particular where ECHA has adopted a decision requesting that a registration dossier be supplemented by a study involving animal testing, arises from the relevant general provisions of the REACH Regulation and from the guiding principle of limiting animal testing which those general provisions reflect. In particular, the REACH Regulation requires the use of information obtained by means other than animal testing 'wherever possible' and that such testing be undertaken 'only as a last resort'. Finally, the Court finds that ECHA must examine those adaptations and rule on their compliance in accordance with the procedural and decision-making arrangements laid down by the REACH Regulation, which it did not do in the present case, as the General Court was correct to find.

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<sup>43</sup> Decision taken under Article 41(3) of the REACH Regulation.

<sup>44</sup> Article 5 and Article 6(1) of the REACH Regulation.

<sup>45</sup> Articles 125 and 126 of the REACH Regulation, read in the light of recitals 121 and 122 of that regulation.

<sup>46</sup> Article 51 of the REACH Regulation.

<sup>47</sup> Articles 6, 20, 22, 41 and 42 and recitals 19, 20 and 44 of the REACH Regulation.

## VII. ECONOMIC AND MONETARY POLITICY

### Judgment of the Court (Grand Chamber) of 26 January 2021

[Joined Cases C-422/19 et C-423/19](#)

[Hessischer Rundfunk](#)

Reference for a preliminary ruling – Economic and monetary policy – Article 2(1) and Article 3(1)(c) TFEU – Monetary policy – Exclusive competence of the European Union – Article 128(1) TFEU – Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank – Article 16, first paragraph – Concept of ‘legal tender’ – Effects – Obligation to accept euro banknotes – Regulation (EC) No 974/98 – Whether possible for Member States to impose limitations on payments by means of banknotes and coins denominated in euro – Conditions – Regional legislation precluding the payment in cash of a radio and television licence fee to a regional public broadcasting body

Two German citizens who were liable to pay a radio and television licence fee in the *Land* of Hesse (Germany) offered to pay it to Hessischer Rundfunk (Hesse’s broadcasting body) in cash. Invoking its regulations on the procedure for payment of radio and television licence fees, which preclude any possibility of paying the licence fee in cash,<sup>48</sup> Hessischer Rundfunk refused their offer and sent them payment notices.

The two German citizens brought an action against those payment notices and the dispute reached the Bundesverwaltungsgericht (Federal Administrative Court, Germany). That court noted that the exclusion of the possibility of paying the radio and television licence fee by means of euro banknotes, as provided for by Hessischer Rundfunk’s regulations on the payment procedure, infringes a higher-ranking provision of federal law, under which euro banknotes are to be unrestricted legal tender.<sup>49</sup>

The Bundesverwaltungsgericht (Federal Administrative Court), however, queried whether that provision of federal law is compatible with the exclusive competence of the European Union in the area of monetary policy for the Member States whose currency is the euro, and referred the matter to the Court of Justice for a preliminary ruling. It also asked whether the status as legal tender of banknotes denominated in euro prohibited the public authorities of Member States from ruling out the possibility of a statutorily imposed payment obligation being discharged in cash, as is the case for payment of the radio and television licence fee in the *Land* of Hesse.

The Grand Chamber of the Court of Justice rules that a Member State whose currency is the euro may, in the context of the organisation of its public administration, adopt a measure obliging that administration to accept payment in cash or introduce, for a reason of public interest and under certain conditions, a derogation from that obligation.

#### Findings of the Court

First, the Court of Justice interprets the concept of ‘monetary policy’ in the area in which the European Union has exclusive competence for the Member States whose currency is the euro.<sup>50</sup>

The Court begins by stating that that concept is not limited to its operational implementation but also entails a regulatory dimension intended to guarantee the status of the euro as the single currency. Next, it notes that the attribution of the status of ‘legal tender’ only to euro banknotes issued by the

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<sup>48</sup> Paragraph 10(2) of the *Satzung des Hessischen Rundfunks über das Verfahren zur Leistung der Rundfunkbeiträge* (Regulations of Hessischer Rundfunk on the procedure for payment of radio and television licence fees) of 5 December 2012.

<sup>49</sup> Second sentence of Paragraph 14(1) of the *Gesetz über die Deutsche Bundesbank* (Law on the German central bank), in the version published on 22 October 1992 (BGBl. 1992 I, p. 1782), as amended by the Law of 4 July 2013 (BGBl. 2013 I, p. 1981).

<sup>50</sup> Under Article 3(1)(c) TFEU, given that, according to Article 2(1) TFEU, only the European Union may legislate and adopt legally binding acts in that area.

European Central Bank and the national central banks<sup>51</sup> affirms the official nature of those banknotes in the euro area, excluding the possibility that other banknotes may also qualify for that status. It adds that the concept of 'legal tender' of a means of payment denominated in a currency unit signifies that that means of payment cannot generally be refused in settlement of a debt denominated in the same currency unit. Last, it points out that the fact that the EU legislature can lay down the measures necessary for the use of the euro as the single currency<sup>52</sup> reflects the need to establish uniform principles for all Member States whose currency is the euro and contributes to the pursuit of the primary objective of the European Union's monetary policy, which is to maintain price stability.

Consequently, the Court rules that the European Union alone is competent to specify the status of legal tender accorded to banknotes denominated in euro. The Court recalls that, where competence is conferred exclusively on the European Union, Member States cannot adopt or retain a provision falling within that competence, even in a situation where the European Union has not exercised its exclusive competence.

However, the Court notes that it is not necessary for the establishment of the status of legal tender of banknotes denominated in euro or for the preservation of their effectiveness as legal tender to impose an absolute obligation to accept those banknotes as a means of payment. Nor is it necessary that the European Union lay down exhaustively and uniformly the exceptions to that fundamental obligation, so long as it is possible, as a general rule, to pay in cash.

Consequently, the Court concludes that the Member States whose currency is the euro are competent to regulate the procedures for settling pecuniary obligations, so long as it is possible, as a general rule, to pay in cash denominated in euro. Thus, a Member State can adopt a measure which obliges its public administration to accept cash payments in that currency.

Second, the Court notes that the status of legal tender of banknotes and coins denominated in euro implies, in principle, an obligation to accept them. However, it makes clear that that obligation may, in principle, be restricted by the Member States for reasons of public interest, provided that those restrictions are proportionate to the public interest objective pursued, which means, in particular, that other lawful means for the settlement of monetary debts must be available.

In that regard, the Court states that it is in the public interest that monetary debts to public authorities may be honoured in a way that does not involve those authorities in unreasonable expense which would prevent them from providing services cost-effectively. Thus, the public interest reason relating to the need to ensure the fulfilment of a statutorily imposed payment obligation is capable of justifying a limitation on cash payments, in particular where the number of licence fee payers from whom the debt has to be recovered is very high.

It is nevertheless for the Bundesverwaltungsgericht (Federal Administrative Court) to ascertain whether such a limitation is proportionate to the objective of actually recovering the radio and television licence fee, in particular in the light of the fact that the lawful alternative means of payment may not be readily accessible to everyone liable to pay it.

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<sup>51</sup> The status as legal tender of banknotes denominated in euro is established in the third sentence of Article 128(1) TFEU, the third sentence of the first paragraph of Article 16 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (OJ 2016 C 202, p. 230), and the second sentence of Article 10 of Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ 1998 L 139, p. 1).

<sup>52</sup> Article 133 TFEU.



## Judgment of the General Court (Tenth Chamber, Extended Composition) of 20 January 2021

[Case T-758/18](#)

[ABLV Bank v CRU](#)

Economic and monetary Union – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Setting of the 2015 and 2018 *ex ante* contributions – Rejection of the request for a recalculation and a reimbursement of contributions – Action for annulment – Challengeable act – Admissibility – Institution whose licence has been withdrawn – Article 70(4) of Regulation (EU) No 806/2014 – Concept of ‘change of status’ – Article 12(2) of Delegated Regulation (EU) 2015/63

The applicant, ABLV Bank AS, was, until 11 July 2018, a licensed Latvian credit institution as well as a ‘significant entity’ subject to supervision by the European Central Bank (ECB) under the Single Monitoring Mechanism (SSM).

On 13 February 2018, the United States Treasury Department announced a proposed measure to designate the applicant as an institution of primary money laundering concern. Following that announcement, the applicant was no longer able to make payments in dollars and experienced a wave of deposit withdrawals. The ECB therefore instructed the Latvian Financial and Capital Markets Commission to impose a moratorium to allow the applicant to stabilise its situation. On 23 February 2018, the ECB found that the applicant was failing or likely to fail and the Single Resolution Board (SRB) found that a resolution action in respect of the applicant was not necessary in the public interest.

The applicant paid the amounts due as *ex ante* contributions for the years 2015 and 2018, as indicated by the Financial and Capital Markets Commission.

Following the withdrawal of its licence by the ECB, on 11 July 2018, the applicant applied to the SRB for the repayment of a proportion of the contributions paid for the year 2015, the recalculation of the amount of its *ex ante* contribution for the year 2018 and the repayment of the amounts overpaid as *ex ante* contributions.

By letter of 17 October 2018 (‘the contested decision’), the SRB considered, first, that the ECB’s decision concerning the applicant had no effect on its 2018 *ex ante* contribution, in that it did not require it to recalculate or reimburse part of that contribution. Secondly, with regard to the 2015 *ex ante* contributions, the SRB considered that the entities which had paid these contributions and whose licence had subsequently been withdrawn did not benefit from a right to reimbursement of those contributions.

The applicant brought an action for annulment of the contested decision, relying in particular on pleas in law alleging failure to have regard to the alleged *pro rata temporis* nature of *ex ante* contributions. That action was, however, dismissed by the General Court, which, sitting in an extended composition, ruled for the first time on the non-refundability of the *ex ante* contributions duly received.

### Findings of the Court

In the first place, the General Court examines the 2018 *ex ante* contribution. In that regard, it recalls, first, the annual nature of the *ex ante* contributions paid by each authorised institution, established in a Member State participating in the Banking Union, to the Single Resolution Fund (SRF) and, second, the non-refundable nature of those contributions, received in due form.<sup>53</sup> With regard to the annual nature of those contributions, it does not mean that they ‘relate’ to a specific year, with the

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<sup>53</sup> Article 70(4) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

consequence that an adjustment would necessarily have to be made when an institution loses its licence in the course of the year.

Next, the Court notes, first, that *ex ante* contributions to the SRF are collected from financial sector actors prior to and independently of any resolution operation. Secondly, resolution instruments can only apply to entities which are failing or likely to fail and only when necessary to achieve the objective of financial stability in the public interest. Consequently, it is only the preservation of that interest, and not the individual interest of an institution, which is the decisive factor for the use of the SRF. In that regard, the Court states that the payment of the *ex ante* contributions does not guarantee any consideration, but is intended to provide the SRF with funds in the public interest and to ensure the stability of the European banking system. The applicant has therefore paid its compulsory contribution to the SRF for the year 2018, as an actor in the financial sector entrusted by the legislature with the task of financing the stabilisation of the financial system.

Finally, if the SRB had to take into account the evolution of the legal and financial situation of credit institutions during the contribution period concerned, it would be difficult, first, to calculate reliably and stably the contributions due by each of those institutions and, secondly, to pursue the objective of reaching, at the end of the initial period, at least 1% of the amount of deposits covered by all institutions authorised in the territory of a Member State.

In the second place, the General Court examines the interpretation of the concept of ‘change of the status’ of a credit institution.<sup>54</sup> Therefore, relying on the case-law of the Court of Justice according to which that concept could cover any kind of change in the legal or factual situation of an institution,<sup>55</sup> the General Court concludes that the withdrawal of a credit institution’s licence by the ECB falls under that concept, which must be understood as including the cessation of activity of an institution as a result of the loss of its licence during the contribution period. It also clarifies that such withdrawal does not affect the obligation of an institution to pay the full *ex ante* contribution due in respect of that contribution period.

As regards, in the third and last place, the reimbursement of the remaining balance of the *ex ante* contribution paid by the applicant for 2015, the Court notes first that the national resolution funds, created in 2015, had to be progressively replaced by a Single Resolution Fund common to all Member States forming part of the Banking Union. In that context, as a first step, the Member States had to levy *ex ante* contributions on institutions authorised in their territory as from 1 January 2015. As a second step, the contributions thus received by the Member States were transferred to the SRF.<sup>56</sup> After their transfer, no distinction is made between contributions according to the year or legal basis under which they were collected. Therefore, both the contributions for 2015 and those for subsequent years are put together and mixed in that fund.

Next, the Court notes that the provision relating to the calculation method of the individual contributions of each institution by the SRB, during the initial period (2016-2023), makes no mention of a right to reimbursement of contributions for 2015 in the event that an institution withdraws from the resolution system during that period. Nor does that provision provide that the contributions for 2015 are advance payments for the initial period of the SRF.<sup>57</sup> Where that provision provides that the *ex ante* contributions are deducted from the amount owed by each institution, the aim pursued by that provision is to ‘incorporate’ the amounts transferred to the SRF into the calculation of individual contributions. Thus, when an institution loses its licence, it will no longer have to pay contributions in the future and is therefore no longer concerned by the calculation method. Consequently, the contributions for 2015 are not advance payments for the initial period of the SRF and, therefore, must not be reimbursed when an institution loses its licence. However, it cannot be ruled out that the

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<sup>54</sup> Article 12(2) of Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to *ex ante* contributions to resolution financing arrangements (OJ 2015 L 11, p. 44).

<sup>55</sup> Judgment of 14 November 2019, *State Street Bank International* (C-255/18, EU:C:2019:967).

<sup>56</sup> Article 3 of the Intergovernmental Agreement on the Transfer and Pooling of Contributions to the SRF, signed in Brussels on 21 May 2014.

<sup>57</sup> Article 8(2) of Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to *ex ante* contributions to the Single Resolution Fund (OJ 2015 L 15, p. 1).

calculation of an institution's annual contribution for, for example, 2018 may result, following the deduction of the contribution for 2015, in a negative amount and the payment of the corresponding sum to that institution. That reimbursement is however not based on the principle of *pro rata temporis*, but rather on the result of a mathematical operation carried out to determine the amount of the annual contribution of that institution for 2018. Moreover, although the amount of the contributions for 2015 was set by the national resolution authorities, those contributions are to be considered as contributions to the SRF in the same way as those calculated by the SRB due to the fact that the contributions, once transferred, are put together and mixed in the SRF.

Finally, the Court concludes that the SRB was correct to hold that the withdrawal of a credit institution's licence by the ECB, during the contribution period, did not entitle that institution to a refund of the sums paid in respect of its *ex ante* contributions duly received.

## VIII. SOCIAL POLICY – EQUAL TREATMENT IN MATTERS OF EMPLOYMENT AND OCCUPATION

### Judgment of the Court (Grand Chamber) of 26 January 2021

[Case C-16/19](#)

[Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie](#)

Reference for a preliminary ruling – Social policy – Equal treatment in employment and occupation – Directive 2000/78/EC – Article 2(1) and (2)(a) and (b) – ‘Concept of discrimination’ – Direct discrimination – Indirect discrimination – Discrimination on grounds of disability – Difference in treatment within a group of workers with disabilities – Grant of an allowance to workers with disabilities who have submitted disability certificates after a date chosen by the employer – Exclusion of workers with disabilities who have submitted their certificates before that date

VL was employed by a hospital in Kraków (Poland) from October 2011 to September 2016. In December 2011, she obtained a disability certificate, which she submitted to her employer that same month. In order to reduce the amount of the contributions payable by the hospital to the Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych (State Fund for the Rehabilitation of Persons with Disabilities) (PFRON), the director of that establishment decided, following a meeting with the staff which took place in the second half of 2013, to grant a monthly allowance to employees who, following that meeting, submitted certificates attesting to their disabilities. On the basis of that decision, the allowance was granted to thirteen workers who had submitted their certificates after that meeting, whereas sixteen other workers, including VL, who had submitted their certificates earlier, did not receive that allowance.

The action brought against her employer having been dismissed at first instance, VL brought an appeal before the referring court, the Sąd Okręgowy w Krakowie (Regional Court, Kraków, Poland). In her view, the practice adopted by her employer, the effect of which was to exclude certain workers with disabilities from receiving an allowance granted to workers with disabilities, and the sole aim of which was to reduce the contributions payable by the hospital by encouraging workers with disabilities who had not yet submitted disability certificates to do so, is contrary to the prohibition of any direct or indirect discrimination on the grounds of disability laid down by Directive 2000/78.<sup>58</sup>

In that context, having doubts as to the interpretation of Article 2 of that directive and, in particular, as to whether discrimination, within the meaning of that provision, may be taken to occur where a distinction is made by an employer within a group of workers with the same protected characteristic, the referring court decided to refer a question to the Court of Justice. It sought to ascertain whether the practice adopted by an employer and consisting in the exclusion of workers with disabilities, who have already submitted disability certificates to that employer before the date chosen by that employer for the submission of such a certificate, from receiving an allowance paid to workers with disabilities may constitute discrimination for the purposes of that provision.

#### Findings of the Court

The Court, sitting as the Grand Chamber, begins by examining whether a difference in treatment occurring within a group of persons who have disabilities may be covered by the ‘concept of discrimination’ referred to in Article 2 of Directive 2000/78. In that regard, it notes that the wording of that article does not permit the conclusion that, regarding that protected ground, the prohibition of discrimination laid down by that directive is limited only to differences in treatment between persons

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<sup>58</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

who have disabilities and persons who do not have disabilities. The context of that article does not include such a limitation either. As regards the objective of that directive, it supports an interpretation whereby that directive does not limit the circle of persons in relation to whom a comparison may be made in order to identify discrimination on the grounds of disability to those who do not have disabilities. The Court also finds that, while it is true that instances of discrimination on the grounds of disability, for the purposes of that directive, are, as a general rule, those where persons with disabilities are subject to less favourable treatment than persons who do not have disabilities, the protection granted by that directive would be diminished if it were to be considered that a situation where such discrimination occurs within a group of persons, all of whom have disabilities, is, by definition, not covered by the prohibition of discrimination laid down thereby. Thus, the principle of equal treatment enshrined in Directive 2000/78 is intended to protect a worker who has a disability against any discrimination on the basis of that disability, not only as compared with workers who do not have disabilities but also as compared with other workers who have disabilities.

The Court goes on to assess whether the practice at issue may constitute discrimination on the grounds of disability as prohibited by Directive 2000/78. In that regard it indicates, in the first place, that, where an employer treats a worker less favourably than another of his or her workers in a comparable situation and where it is established, having regard to all the relevant circumstances of the case, that that unfavourable treatment is based on the former worker's disability, inasmuch as it is based on a criterion which is inextricably linked to that disability, such treatment is contrary to the prohibition of direct discrimination set out in Article 2(2)(a) of Directive 2000/78. As the practice at issue has given rise to a difference in treatment between two categories of workers with disabilities who are in a comparable situation, it is therefore for the referring court to determine whether the temporal condition imposed by the employer for receiving the allowance in question, namely the submission of the disability certificate after a date chosen by that employer, constitutes a criterion which is inextricably linked to the disability of the workers who were refused that allowance. The Court of Justice notes in that regard that, in the present case, the employer does not seem to have permitted workers with disabilities who had already submitted their disability certificates before that date to resubmit them or to file new ones, so that that practice may have made it impossible for a clearly identified group of workers, consisting of all the workers with disabilities whose disabled status was necessarily known to the employer when that practice was introduced – those workers having previously formalised that status by submitting disability certificates – to satisfy that temporal condition. Accordingly, such a practice may constitute direct discrimination where it is such as to make it impossible for a clearly identified group of workers, consisting of all the workers with disabilities whose disabled status was necessarily known to the employer when that practice was introduced, to satisfy that temporal condition.

In the second place, the Court of Justice emphasises that, should the referring court find that the difference in treatment in question stems from an apparently neutral practice, it will be for the referring court, in order to determine whether that practice constitutes indirect discrimination for the purposes of Article 2(2)(b) of Directive 2000/78, to ascertain whether it has had the effect of placing persons who have certain disabilities at a particular disadvantage as compared with persons who have other disabilities and, in particular, whether it had the effect of putting certain workers with disabilities at a disadvantage because of the particular nature of their disabilities, including the fact that such disabilities were visible or required reasonable adjustments to be made. According to the Court, it could be held that it was primarily workers who have such disabilities who were obliged, before the date chosen by the hospital in question, to make their state of health formally known to their employer, by submitting disability certificates, whereas other workers who have disabilities of a different nature, for example because those disabilities are less serious or do not immediately require such adjustments to be made, still had a choice as to whether or not to take that step. Accordingly, a practice such as the one in question, although apparently neutral, may constitute discrimination indirectly based on disability if, without being objectively justified by a legitimate aim and without the means of achieving that aim being appropriate and necessary, which it is for the referring court to ascertain, it puts workers with disabilities at a particular disadvantage depending on the nature of their disabilities.

## IX. ENVIRONMENT – AARHUS CONVENTION

### Judgment of the Court (First Chamber) of 20 January 2021

[Case C-619/19](#)

[Land Baden-Württemberg \(Communications internes\)](#)

Reference for a preliminary ruling – Environment – Aarhus Convention – Directive 2003/4/EC – Public access to environmental information – ‘Stuttgart 21’ infrastructure project – Refusal of a request for environmental information – Article 4(1) – Grounds for refusal – Term ‘internal communications’ – Scope – Limitation in time of the protection of such communications

In October 2010, trees were felled in Stuttgart Castle Park, Baden-Württemberg (Germany), for the purpose of carrying out the ‘Stuttgart 21’ infrastructure and urban development project. In that context, D.R., a natural person, sent a request to the State Ministry of the *Land* of Baden-Württemberg seeking access to certain documents. Those documents involve, first, an item of information transmitted to that ministry relating to the work of a committee of inquiry in respect of a police operation preceding the felling of the trees and second, notes of that ministry relating to the carrying out of a conciliation procedure in connection with the ‘Stuttgart 21’ project. The request for access was refused.

The legal action brought by D.R. against the decision refusing access was upheld by the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg, Germany), according to which no ground for refusing access applied to the documents requested. That court held *inter alia* that the ground for refusal applicable to ‘internal communications’ of public authorities can no longer be relied upon once the decision-making process of the authority concerned has been completed. That ground for refusing access is laid down by the legislation transposing into German law the directive concerning public access to environmental information, which gives the Member States the power to establish such an exception to the public’s right of access.<sup>59</sup>

The Bundesverwaltungsgericht (Federal Administrative Court, Germany), before which an appeal on a point of law was brought, proceeded on the basis of the premiss that D.R. had requested access to environmental information within the meaning of the directive concerning public access to environmental information. Since it had doubts as to the scope and as to the limitation in time of the ground, referred to in the directive, enabling access to ‘internal communications’ to be refused, it decided to submit questions to the Court on those matters.

#### Findings of the Court

First of all, the Court considers the interpretation of the concept of ‘internal communications’ of public authorities, within the meaning of the directive concerning public access to environmental information.

As regards, first, the word ‘communication’, the Court observes that this word relates to information addressed by an author to someone, an addressee who or which may be an abstract entity or a specific person belonging to such an entity. That interpretation is supported by the context of the exception that the Member States may lay down for internal communications. The directive adopts the distinction established by the Aarhus Convention<sup>60</sup> between the term ‘material’, which does not necessarily concern information that is addressed to someone, and the term ‘communication’.

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<sup>59</sup> Article 4(1)(e) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26).

<sup>60</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).



As regards, second, the word 'internal', the Court observes that only environmental information which does not leave the internal sphere of a public authority is considered to be 'internal'. That also applies to information from an external source after it has been received, provided that it has not been disclosed to a third party or been made available to the public. That interpretation is supported by the objective, pursued by the exception available to the Member States, of ensuring that public authorities have a protected space in order to engage in reflection and to pursue internal discussions.

The Court states, in that regard, that the fact that an item of environmental information may be liable to leave the internal sphere of a public authority at a given time cannot cause the communication containing it to cease immediately to be internal in nature. Whilst exceptions to the right of access are to be interpreted strictly, that cannot limit the scope of the exception for internal communications in disregard of the directive's wording.

Consequently, the term 'internal communications' encompasses all information which circulates within a public authority and which, on the date of the request for access, has not left that authority's internal sphere – as the case may be, after being received by that authority, provided that it was not or should not have been made available to the public before it was so received.

Next, the Court examines the temporal applicability of the ground for refusal of access to environmental information included in internal communications. It states, in that regard, that its applicability is not limited in time and does not depend on the drawing up of a document or on the progress in or completion of some administrative process.

However, refusal of access to environmental information because it is included in an internal communication must always be founded on a weighing of the interests involved in the particular case. Indeed, in the light of the particularly broad material scope of that exception, the weighing of the interests, which must be carried out on the basis of an actual examination of each situation, is especially important and must therefore be tightly controlled.

In carrying out that examination, the public authority to which a request for access has been made is required to consider, in any event, reasons which may support disclosure, such as bringing about a free exchange of views, more effective participation by the public in environmental decision-making or a better environment. It must also examine any particulars provided by the applicant that support disclosure of the information sought, without the applicant being required to set out a specific interest justifying disclosure.

Furthermore, when the information requested is contained in an internal communication, the public authority must take into account the time that has passed since that communication and the information contained in it were drawn up. That authority may take the view that, in the light of the time that has passed since it was drawn up, such information is no longer sensitive. Accordingly, the Court states that the exception to the right of access that the Member States may lay down for internal communications can apply only for the period during which protection of the information sought is justified.

Finally, the Court states that the weighing of interests must be capable of being checked and be amenable to administrative and judicial review at national level. In order to meet that requirement, a decision refusing access must be notified to the applicant and set out why there is a foreseeable risk that the disclosure of information could specifically and actually undermine the interest protected by the exception relied upon.

## **Judgment of the General Court (Second Chamber, Extended Composition) of 27 January 2021**

[Case T-9/19](#)

[ClientEarth v BEI](#)

Environment – Financing of a biomass power generation plant in Galicia – Resolution of the Board of Directors of the EIB approving the financing – Access to justice in environmental matters – Articles 9 and 10 of the Aarhus Convention – Articles 10 to 12 of Regulation (EC) No 1367/2006 – Request for an internal

review – Refusal of the request as inadmissible – Action for annulment – Admissibility of a ground of defence – Obligation to state reasons – Concept of an act adopted under environmental law – Concept of an act having a legally binding and external effect

In 2016, the promoter of a project for the construction of a biomass power generation plant fuelled by forest waste, in the municipality of Curtis in Galicia (Spain), sought financing from the European Investment Bank (EIB). By resolution of 12 April 2018 ('the resolution at issue'), the Board of Directors of the EIB preliminarily approved the financing proposal for that project in the form of a loan. The EIB informed the promoter about the resolution at issue, pointing out that the approval did not create any legal obligation for the EIB to grant the loan, but allowed the promoter to take the steps needed to formalise the loan.

ClientEarth, a non-governmental organisation for the protection of the environment, submitted a request to the EIB for an internal review of the resolution at issue, in accordance with Article 10 of the Aarhus Regulation<sup>61</sup> and the decision laying down detailed rules for the application of that regulation.<sup>62</sup> ClientEarth challenged, in essence, the assessment of the Board of Directors of the EIB that the project in question contributed to the achievement of European environmental objectives.

The EIB rejected the request for internal review as being inadmissible on the ground that the resolution at issue did not constitute an 'administrative act' subject to internal review under the Aarhus Regulation.

In support of its action for annulment of that rejection decision, ClientEarth put forward two pleas in law alleging, first, infringement of the obligation to state reasons and, secondly, misapplication of the conditions necessary for an act to be classified as an 'administrative act' within the meaning of the Aarhus Regulation.

This action has been upheld by the Second Chamber (Extended Composition) of the General Court. In its judgment, that court examines the novel question of whether a decision of the Board of Directors of the EIB approving the financing of a project may be classified as an administrative act within the meaning of the Aarhus Regulation.

#### Findings of the Court

First of all, the Court rejects, as inadmissible, the ground of defence relied on by the EIB, contending that the request for internal review is incompatible with the independence of the EIB in the sphere of its financial operations. In so far as that defence did not appear as an independent ground in the statement of reasons for the decision rejecting the request for internal review, an examination of the substance of that defence would place the Court in the situation of substituting its own reasoning for that adopted by the EIB in the contested act, which the Court is not permitted to do when reviewing the legality of acts under Article 263 TFEU.

As regards ClientEarth's first plea in law, concerning infringement of the obligation to state reasons, the Court notes that the decision rejecting the request for internal review was subject to the obligation to state reasons under Article 296 TFEU. Nevertheless, as the EIB gave a sufficient explanation for the reasons which led it to conclude that the resolution at issue did not satisfy the conditions required for classification as an administrative act, the plea alleging infringement of the obligation to state reasons is rejected as unfounded.

As regards ClientEarth's second plea in law, alleging misapplication of the conditions required for the resolution at issue to be classified as an administrative act within the meaning of the Aarhus Regulation, the Court notes, as a preliminary point, the need to safeguard the effectiveness of the

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<sup>61</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13) ('the Aarhus Regulation').

<sup>62</sup> Commission Decision No 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts (OJ 2008 L 13, p. 24).

Aarhus Convention<sup>63</sup> when interpreting those conditions. According to that regulation,<sup>64</sup> the concept of ‘administrative act’ covers any measure of individual scope under environmental law, taken by an EU institution or body, and having legally binding and external effects.

As regards the first condition relating to the adoption of an act under environmental law, the Court states that that concept covers any measure of individual scope subject to requirements under secondary EU law which, regardless of their legal basis, are directly aimed at achieving the objectives of EU policy on the environment. In reaching this conclusion, it refers, *inter alia*, to the broad definition given to the concept of ‘environmental law’ in the Aarhus Regulation,<sup>65</sup> which includes any EU legislation which contributes to the pursuit of the objectives of EU policy on the environment as set out in the TFEU. The Court states that the legislation referred to in that definition includes internal rules of general application governing EIB lending activity, in particular the environmental criteria for the eligibility of projects for EIB funding adopted by the EIB. Furthermore, in accordance with the Aarhus Convention, access to justice in environmental matters may not be restricted solely to acts of public authorities based on a provision of environmental law. Accordingly, the Court considers that the resolution at issue, in so far as it found that the project at issue satisfied the eligibility criteria of an environmental nature adopted by the EIB, constituted a measure of individual scope adopted under environmental law.

As regards the second condition relating to the legally binding and external effect which must result from the administrative act, in accordance with the Aarhus Regulation, the Court notes that the interpretation of that concept must be consistent with the concept of an act producing legal effects *vis-à-vis* third parties, within the meaning of Article 263 TFEU. In that regard, the Court finds that the resolution at issue contained the adoption of a definitive position by the Board of Directors of the EIB on the eligibility of the project in question for financing in the light of its environmental and social aspects. To that extent, it produced definitive legally binding effects *vis-à-vis*, *inter alia*, the promoter of the project, in so far as the finding of eligibility enabled him to take the next steps needed to formalise the loan, despite the fact that other aspects of the project remained to be examined. In that context, the Court concludes that, since ClientEarth’s request for internal review concerned the environmental aspects of the project, that request related, at least in part, to the definitive legally binding effects *vis-à-vis* third parties produced by the resolution at issue.

In the light of the above findings, the Court annuls the EIB’s decision rejecting, as being inadmissible, ClientEarth’s request for an internal review.

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<sup>63</sup> Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

<sup>64</sup> Article 2(1)(g) of the Aarhus Regulation.

<sup>65</sup> Article 2(1)(f) of the Aarhus Regulation.

## X. CIVIL SERVICE

### Judgment of the General Court (Fourth Chamber) of 13 January 2021

[Case T-548/18](#)

[Helbert v EUIPO](#)

Civil service – Recruitment – Notice of competition – Open Competition EUIPO/AD/01/17 – Decision not to place the applicant's name on the reserve list for the competition – Composition of the selection board – Stability – Liability

On 12 January 2017, the European Personnel Selection Office (EPSO) published the notice of Open Competition EUIPO/AD/01/17. The purpose of that competition was to draw up a reserve list for the recruitment of administrators by the European Union Intellectual Property Office (EUIPO).

The applicant, Mr Lars Helbert, applied to take part in that competition and was invited to the assessment centre, where he took part in the tests.

Subsequently, EPSO informed the applicant that the selection board had decided not to place him on the reserve list of successful candidates in the competition on the ground that he was not among the candidates who had obtained the highest marks. The selection board confirmed its initial decision following the applicant's request for review. The applicant lodged a complaint with EUIPO, which was rejected.

Following the rejection of the complaint, the applicant brought an action before the General Court by which he sought annulment of the initial decision of the selection board not to place him on the reserve list of successful candidates and of the decision of the selection board taken after review. That second decision, which is the act adversely affecting the applicant within the meaning of Article 90(2) of the Staff Regulations of Officials of the European Union, constitutes 'the contested decision'.

The applicant submitted, inter alia, that there was a lack of stability in the composition of the selection board during the oral tests of the competition, in so far as all of the members of the selection board did not attend all of those tests and in so far as, instead, there were 'selection committees' composed of only a few members who each examined a limited number of candidates. He also alleges insufficient implementation of coordination measures to ensure consistent and objective assessment, equal opportunity and equal treatment of candidates. In those circumstances, according to the applicant, there was a failure to comply with the principles of consistency of the selection board, equal opportunity, equal treatment of candidates and objectivity of assessments as well as certain points of the notice of competition. The applicant also sought compensation for the moral damage which he claims to have suffered as a result of the unlawful conduct of the selection board and EUIPO.

After examining and clarifying the safeguards attaching to the selection procedure and, in particular, the requirements of stability in the composition of the selection board, the Court annulled the contested decision. By contrast, it rejected the claim for compensation.

#### Findings of the Court

The Court points out that the selection board is obliged to ensure consistent application of the assessment criteria to all candidates by ensuring, inter alia, that its composition is stable so far as possible in order to ensure equal treatment of candidates, consistent marking and objectivity of the assessment. The requirement of stability is particularly necessary in the oral tests, since those tests are by their nature less uniform than the written tests.

In the present case, the Court finds that the composition of the selection board varied significantly during the oral tests.

However, logistical problems may, exceptionally, justify a relaxation of the rule of stability in the composition of the selection board. That is the case, *inter alia*, where, in a competition involving numerous candidates, the organisation of oral tests gives rise to significant difficulties related, first, to the organisation of multiple tests for candidates belonging to different linguistic groups and, second, to the necessity, for the members of the selection board or, in any event, for some of them, to comply with their service requirements in cases where competitions are conducted out over a relatively long period.

That said, the Court finds that none of the reasons put forward by EUIPO can, in the present case, justify the significant variation established in the composition of the selection board. That is the case, in particular, with regard to the linguistic diversity of the candidates, in view of the wide linguistic capacities of the selection board members and the very high proportion of interviews in English.

The division of the tests between two assessment centres in order to shorten the duration of the competition also cannot, *per se*, justify the setting up of 26 different selection committees.

As regards the impossibility, for some members of the selection board, to be sufficiently available to hold an interview with each candidate, the Court finds that it is for the EU agencies and institutions to release staff assigned to recruitment for a sufficient period of time to enable them to carry out their task, at the risk of not being able to recruit, as is required, officials or other servants of the highest standard of ability, efficiency and integrity. Furthermore, in the event that the full members of a competition selection board are prevented from attending, they may be replaced, in the tests of some of the candidates, by alternate members in order for the selection board to complete its work within a reasonable period.

However, it cannot be excluded that, in the absence of selection board stability, equal treatment of candidates, consistent marking and objectivity of the assessment may be obtained by means such as putting in place appropriate coordination.

In that regard, the exchanges among the selection board members which occur before, during and after the tests are particularly important for the purpose of ensuring compliance with those principles. In the present case, however, EUIPO has not adduced sufficient evidence to establish that regular exchanges between the members of the selection board, before, during and after the oral tests, made it possible to ensure consistent marking and objectivity of the assessment of the candidates and, therefore, to ensure that they were treated equally.

Similarly, the Court observes that there is no ground on which to conclude that the assessment criteria were set before the start of the tests.

Furthermore, the Court notes that the chairperson and the vice-chairperson of the selection board never attended the first minutes of the same interview together, that the alleged existence of daily exchanges of views between the chairperson and the vice-chairperson of the selection board regarding the coordination of the working methods of the selection board members is not established and that the vice-chairperson was absent from several meetings which preceded or followed the assessment centre tests, although those meetings were, according to EUIPO, a key step in the procedure designed to ensure equality as between candidates, consistent marking and objectivity of the assessment.

In the light of those considerations, the Court concludes that EUIPO has failed to establish the existence of sufficient measures of coordination such as to ensure that the selection procedure was based on equal treatment and a consistent and objective assessment of the candidates. Consequently, the Court upholds the complaint alleging breach of the rule requiring stability in the composition of the selection board and states that failure to comply with that rule constitutes a breach of the essential procedural requirements entailing the annulment of the contested decision.

As regards the application for compensation, the Court takes the view that, since the applicant has not shown that the moral damage claimed was separable from the illegality on which the annulment of the contested decision is based, that annulment constitutes, in itself, appropriate compensation for the damage which that decision may have occasioned.